

1 By its Order filed July 15, 2004, this Court converted the motion to dismiss into a
2 motion for summary judgment and granted Plaintiff a Rule 56(f) continuance to allow
3 Plaintiff to obtain discovery on the limited issue of whether Defendant employed 50 persons
4 for the requisite time between January 1, 2002, and April 28, 2003. On September 20, 2004,
5 the Court concluded Plaintiff had presented sufficient evidence to prevent judgment as a
6 matter of law on the threshold issue of whether Defendant employed 50 employees for 20
7 weeks or more during the relevant time period.

8 On October 6, 2004, Defendant filed a Motion to Dismiss for Lack of Subject Matter
9 Jurisdiction, arguing Plaintiff must establish the jurisdictional threshold of 50 employees for
10 the Court to have subject matter jurisdiction over his claims. On February 8, 2005, an
11 evidentiary hearing was held regarding the issue of whether Defendant employed 50
12 employees for 20 weeks or more during the relevant time period. Prior to the evidentiary
13 hearing, the Court determined the issue of covered employee or covered employer under the
14 FMLA presents a mixed issue of merits and jurisdiction and should be determined under
15 Rule 56 standards. At the conclusion of the February 8, 2005 hearing, the Court took under
16 advisement Defendant's Motion to Dismiss.

17 **II. Discussion**

18 On August 4, 2005, Plaintiff filed supplemental authority, indicating the United States
19 Supreme Court had granted certiorari in Arbaugh v. Y & H Corp. to determine whether
20 statutory employee thresholds are jurisdictional or merely relate to the merits of the
21 employees' claims, to which Defendant responded. The Court has reviewed the Amicus Brief
22 filed by the United States and finds its reasoning, employee thresholds merely relate to the
23 merits of the employees' claims, persuasive. See, Bell v. Hood, 327 U.S. 678, 682-683
24 (1946) (concluding "where the complaint, as here, is so drawn as to seek recovery directly
25 under the Constitution or laws of the United States, the federal court . . . must entertain the
26 suit" unless the federal claim "clearly appears to be immaterial and made solely for the
27 purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and
28 frivolous.")

1 On September 20, 2004, the Court concluded Plaintiff had presented sufficient
2 evidence to prevent judgment as a matter of law on the threshold issue of whether Defendant
3 employed 50 employees for 20 weeks or more during the relevant time period. Given the
4 persuasive analysis of the Government's Amicus Brief in Arbaugh, the Court will stand on
5 its September 20, 2004 Order and deny without prejudice the pending motions. Motions
6 related to the issue of whether Defendant employed 50 employees for 20 weeks or more
7 during the relevant time period may be reurged, as appropriate, at the close of full discovery
8 and/or upon direction from the Supreme Court in Arbaugh v. Y & H Corp. See Neiberger
9 v. Hawkins, 150 F. Supp.2d 1118 (D. Colo. 2001) (holding in abeyance portion of the
10 defendant's motion, which sought dismissal of Plaintiffs' ADEA claim, pending issuance of
11 a ruling from the United States Supreme Court regarding whether the Act validly abrogated
12 states' Eleventh Amendment immunity from suit by private individuals).

13 In addition, the Court's rationale in denying Plaintiff's motion to Define the Applicable
14 Statutory Time Period was primarily based on the proximity the issue was raised to the
15 evidentiary hearing. As timeliness issues no longer necessitate the Court refraining from
16 looking to the merits of Plaintiff's argument, the Court concludes the relevant time period is
17 the current year in which the alleged violation may have occurred. See Rogers v. Sugar Tree
18 Prods., 7 F.3d 577, 580 (7th Cir.1993) (rejecting parties' erroneous stipulation to the relevant
19 time period as subverting jurisdictional provisions and concluding that under the ADEA
20 "[t]he current year is the year in which the alleged violation occurred, and the applicable
21 period does not cease on the date of the violation, but rather continues until the end of the
22 calendar year.") Should the issue of whether Defendant employed 50 employees for 20
23 weeks or more during the relevant time period be reurged, the Court holds the relevant time
24 period is January 1, 2002 to December 31, 2003. See, e.g., Komorowski v. Townline Mini
25 Mart and Restaurant, 162 F.3d 962, 965 (7th Cir.1998) (concluding under substantially
26 similar language in Title VII, "current calendar year" means the entire calendar year in which
27 the alleged discrimination occurred).

28 **Accordingly,**

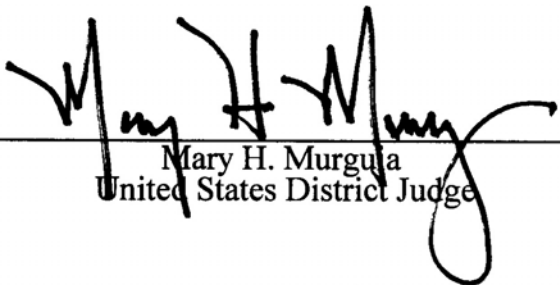
1 **IT IS HEREBY ORDERED** Defendant's Motion to Dismiss Case for Lack of
2 Subject Matter Jurisdiction is DENIED WITHOUT PREJUDICE. (Dkt. #42).

3 **IT IS FURTHER ORDERED** Defendant's Motion to Strike is DENIED WITHOUT
4 PREJUDICE. (Dkt. #93).

5 **IT IS FURTHER ORDERED** that a Rule 16 Scheduling Conference is scheduled
6 for **October 27, 2005 at 4:00 p.m.** The parties shall submit a revised scheduling order on
7 or before October 20, 2005. The revised scheduling order shall provide for the close of
8 discovery no later than March 1, 2005 and dispositive motions due no later than March 31,
9 2005. The parties should take notice, extensions of time will not be granted absent
10 compelling good cause.

11 DATED this 29th day of September, 2005.

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Mary H. Murgula
United States District Judge